SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 198

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND CHARLES DREHER, INSPECTOR IN CHARGE UNITED STATES IMMIGRATION SERVICE, PETITIONERS,

vs.

UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. ALBRO, AN ATTORNEY, FOR MARY COOK AND ANTONIO DANEION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from District Court of the United States, Western New York	1	1
Writ of habeas corpus	1	1
Petition for writ of habeas corpus	3	1
Return to writ of habeas corpus as to Relator Antonio Daneion	7	3
Testimony, attached to return on Relator Daneion	9	4
Return to writ of habeas corpus as to Relator Mary Cook	19	9
Testimony, attached to return on Relator Cook	21	10
Opinion, Hazel, J	30	15
Order dismissing writ	41	20
Petition for appeal	42	21
Assignment of error	43	21
Order allowing appeal	45	22
Citation (omitted in printing)	46	22
Stipulation as to record	48	23
Clerk's certificate (omitted in printing)	48	23
Proceedings in United States Circuit Court of Appeals, Second Circuit	49	23
Opinion, Manton, J	49	24
Decree	53	28
Clerk's certificate (omitted in printing)	55	28
Order revoking order denying certiorari	56	29
Order allowing certiorari	57	29

1 In United States District Court, Western District of New York

THE UNITED STATES OF AMERICA, ON THE PETITION OF PRESTON M. Albro, an attorney, for Mary Cook and Antonio Danelon, relators

against

ARTHUR J. KARNUTH, UNITED STATES DISTRICT DIRECTOR OF IMMIGRATION, and Charles Dreher, inspector in charge United States Immigration Service, respondents

Writ of habeas corpus

The President of the United States of America to Arthur J. Karnuth and/or Charles Dreher, immigration official, or other person having the custody of the relators, greeting:

You are hereby commanded to bring the bodies of Mary Cook and Antonio Danelon, two aliens, by you detained, it is said, to the United States District Court for the Western District of New York, to be held on the 2nd day of December, 1927, at ten o'clock in the morning, or as soon thereafter as counsel can be heard, together with the causes of the aliens' detention, and have then and there with you this writ.

2 Witness: Honorable John R. Hazel, one of the United States district judges for the western district of New York, this 1st day of December, 1927.

HARRIS S. WILLIAMS,
Clerk.

By MAY C. SICKMON,
Chief Deputy.

Writ allowed.
[SEAL.]

JOHN R. HAZEL,
United States District Judge.

3 In United States District Court
[Title omitted.]

Petition for writ of habeas corpus

The petition of Preston M. Albro respectfully shows to this honorable court and alleges on information and belief.

1. That the relators Mary Cook and Antonio Danelon are aliens and are illegally held in custody by the respondents herein under color of authority as United States immigration officials.

2. That on the first day of December, 1927, the relators Mary Cook and Antonio Danelon came from Canada and presented themselves to an immigration inspector, and stated to him as follows: The said Mary Cook stated that she was born in Scotland, came to

4 Canada in May, 1924, and desired to find employment in Buffalo, to return every night to her home in Canada. The said

Antonio Danelon stated that he was born in Italy, came to Canada in 1923, became a Canadian citizen in 1924 by his father's naturalization, and was, since November, 1926, in the employ of the United States Lighting & Heating Corporation at Niagara Falls, New York, and that he was on his way to his employment, and that he intended to return in the evening to his home in Niagara Falls, Canada.

3. Both aliens stated that they were not immigrants, did not intend to reside in the United States, but had only the desire of finding work in the United States or continuing their work in the United States, and each of them was held by the respondents herein, as "Immigrants not in possession of an unexpired immigration visa."

4. That the aliens are about to appeal to the Secretary of Labor from this decision of the immigration officials, but that the taking of such an appeal is an empty ceremony, as the Secretary of Labor has recently promulgated regulations generally known as General Order 86, in which he has stated that persons desiring to look for work or persons desiring to continue work are hereafter and beginning this day to be classified or considered as immigrants. The petitioner respectfully shows that this position of the Secretary of Labor is contrary to and in violation of the statute for such purpose made and provided, in that section 3 of the immigration act expressly
5 exempts aliens visiting the United States temporarily for business from the classification of immigrants.

5. Petitioner further shows that this application to the court is made prematurely and in advance of a decision by the Secretary of Labor on the appeal by reason of the fact that the immigration officials at the port of Buffalo continuously violate section 17 of the immigration act of 1917, which provides that the taking of an appeal shall operate to stay any action in regard to the final disposition of the aliens whose case is appealed, until after a decision shall have been rendered by the Secretary of Labor, in that the immigration officials always return the aliens to Canada in advance of the decision of the Secretary of Labor, and immediately after an appeal is taken, thereby making it impossible to test the correctness of the decision or the rulings of the Secretary of Labor in proper proceedings, and it is desired to keep the aliens within the jurisdiction of the court where they now are, so that this court may determine the propriety of their custody.

6. The reason this petition is verified by the petitioner and not by the relators, is the fact that there is no time to obtain the signature and verification of the relators before these aliens are returned to Canada contrary to the provisions of the statute cited in the foregoing paragraph, and all the information about the retention
6 of the aliens has been received by the petitioner by telephone from Mr. H. Ely Goldsmith, an American citizen, who was present when the aliens were taken in custody.

Therefore petitioner prays in behalf of the aliens that a writ of habeas corpus issue out of this court under the seal thereof, directing the respondents to bring the bodies of the relators into court for such disposition as the court may make of them in the premises.

And your petitioner will ever pray.

(Signed) PRESTON M. ALBRO.

[*Duly sworn to by Preston M. Albro; jurat omitted in printing.*]

In United States District Court

[Title omitted.]

Return to writ of habeas corpus as to Relator Antonio Danelon

Arthur J. Karnuth, acting district director of immigration at Buffalo, New York, within the western district of New York, respectfully alleges and returns—

That the petitioner, Antonio Danelon, is not in his custody and is not detained by him; that the said Antonio Danelon was given a hearing on December 1, 1927, at a meeting of a board of special inquiry held at Buffalo, New York. A copy of the minutes taken upon said hearing being hereto annexed and made a part of this return.

That upon the testimony taken the board of special inquiry refused the alien, Antonio Danelon admittance to the United States on the ground that he was not in possession of an unexpired consular immigration visa required under the Immigration Act of May, 1924; that the Immigration Inspectors Zinns, Shanahan and Stables, who conducted the hearing, were duly authorized to examine the petitioner as to his right to remain within the United States and that the petitioner was given a fair hearing and granted his full legal rights in the premises.

The petitioner was advised by said board of special inquiry of his right to appeal to the Secretary of Labor, and that said petitioner, Antonio Danelon, decided to avail himself of that right.

Wherefore respondent prays that the writ of habeas corpus herein be dismissed.

Dated, Buffalo, N. Y., December 5th, 1927.

ARTHUR J. KARNUTH,
Acting District Director of Immigration.

[*Duly sworn to by Arthur J. Karnuth; jurat omitted in printing.*]

9 IN UNITED STATES DISTRICT COURT

Testimony, attached to return on Relator Danelon

December 1, 1927.
BUFFALO, N. Y.

DANELON, ANTONIO.

CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR STABLES.

PEACE BRIDGE, 12/1/27.

Zinns. NO C. I. V.

11:00 A. M. to 11:15 A. M.

Appealed.

Alien duly sworn:

Age 17; m; s; lead burner; Canada?; No. Italian; reads and writes Italian, Class 4 (5970); in the United States transit, 1923; Philadelphia; accompanied by H. Ely Goldsmith, attorney; Canada, Niagara Falls, Ontario; father, Pietro, 141 Acheson Avenue, Niagara Falls, Ont.; $5.00; self.

Destination: Niagara Falls, N. Y., to U. S. Light & Heat Co.

Med. Cert.: None.

Landed: Philadelphia, Pa., September 25, 1923, "Colombo."

Obj. Migr.: Cross daily to employment.

Ht. 5' 9"; dark; brown; brown; born in Teglec Bonito, Italy, January 17, 1910.

CHAIRMAN to alien:

Q. What is the purpose of your appearance here?

A. My attorney, Mr. Goldsmith, is here and would like to represent me.

Goldsmith to appear before this board of special inquiryETAOIN

Q. According to subdivision B of rule 11, it will be impossi-
10 ble for Mr. Goldsmith to appear before this board of special inquiry and represent you as your attorney.

H. Ely Goldsmith appears before BSI:

I would like to make a statement regarding my appearance in this case. I desire to state to the board that the United States District Court of Alabama, in the case of Miers v. Brownlow, reported in 21 Federal Reporter, second series, has held that the provision of the 1917 immigration act holding that special inquiry hearings shall be separate and apart from the public does mean only that they shall be held separate and apart from the curious public and not separate and apart from counsel for the alien. That in the case an alien through his counsel personally makes a request for his counsel to be present in behalf of the alien, and the board refuses counsel to be present during the entire hearing, that then in that event the hearing is not fair and will be set aside by the courts.

CHAIRMAN to Attorney Goldsmith:

Q. You at this time make a request that you be allowed to represent this man before a board of special inquiry?

A. Yes.

Q. Under the provisions of subdivision B of rule 11, it will be impossible for you to represent this alien before a board of special inquiry.

A. All right; I'll withdraw.

Attorney excused. CHAIRMAN to alien:

Q. Were you ever examined and refused admission to the United States?

A. No.

11 Q. Have you ever been arrested or convicted of any crime either in Canada, Italy, or any other country?

A. No.

Q. Have you ever found it necessary to apply for charity in Canada, Italy, or anywhere?

A. No.

Q. Have you ever been sick or confined in any hospital?

A. No.

Q. Have you been promised or assured employment in the United States?

A. Yes; I am working now.

Q. Where are you employed?

A. At the United States Light and Heat, Niagara Falls, N. Y.

Q. How long have you been employed at the United States Light and Heat?

A. I have been working at Niagara Falls, N. Y., since Nov. 6, 1926.

Q. Have you worked for any other company in the United States other than the United States Light and Heat?

A. I worked for two months at the Aluminum at Niagara Falls, N. Y.

Q. When did you start to work at the Aluminum Co.?

A. I first worked at the United States Light and Heat. I worked there for eight months, then I was laid off and went to work at the Aluminum for two months. Then I was sent for at the U. S. Light again so I have been working there since.

Q. Have you worked for any other company in the United States?

A. No.

Q. During the time you have worked at the United States Light and Heat Company where have you resided?

A. In Niagara Falls, Ontario.

Q. With whom have you been making your home?

A. My father and mother.

12 Q. What is your father's name?

A. Pietro.

Q. What is his address?

A. 141 Acheson Avenue.

Q. During the period you have worked on the American side at Niagara Falls, N. Y., where did you cross the border?

A. Lower Arch Bridge.

Q. You crossed daily at the Lower Arch Bridge, Niagara Falls, N. Y.?

A. Yes.

Q. Were you at any time in possession of an identification card issued by any immigration officer?

A. Yes.

Q. Have you that card with you now?

A. Yes.

(Alien presents identification card No. 2748, in the name of Antonio Danelon, issued at Niagara Falls, N. Y., on November 6, 1926.)

Q. At any time since you have been crossing the United States border from Niagara Falls, Ontario, to Niagara Falls, N. Y., to your daily employment have you filled out what was called a crossing form?

A. Yes, sir. I was handed what was known as crossing form 2543, which was surrendered by me to Inspector Fred S. Murphy.

(Alien presents the stub of the crossing form.)

Q. Since the first of January, 1927, while you were crossing from Canada to the United States at the Lower Arch Bridge or any other point, were you informed that it would be necessary for you in
13 order to continue your employment in the United States to obtain a quota visa from a United States consul in Canada?

A. Yes, sir.

Q. Did you file your application for a quota visa with the United States consul in Canada?

A. I believe my father made application for a visa for himself and the whole family two years ago.

Q. Have you consulted with the United States consul recently regarding your immigration visa?

A. He told me he could do nothing for me now.

Q. Then at the present time you are not in possession of an unexpired consular immigration visa entitling you to remain in the United States or to cross daily for employment?

A. No.

Q. What wages do you make at the U. S. Light and Heat?

A. We work piecework, about $25 a week; $25 to $40.

Q. Have you any money saved in the bank or anywhere?

A. No; I give it all to my father and mother.

Q. Have you ever lived in the United States?

A. No.

Q. Is it your intention to come to the United States to make your home here?

A. No, sir; not myself.

Q. What is your intention?

A. To come to work.

Q. Is your intention simply to live on the Canadian side and come back and forth daily?

A. Yes.

Q. In case your parents get a visa, what will you do?
A. If I am forced to, I will go with my father. If my folks move over I will have to go. I couldn't stay over there alone.

14 Inspector STABLES to alien:

Q. Have you any evidence of your father's Canadian citizenship with you?
A. No.
Questions? None.
Inspector STABLES. I move to refuse this alien admission to the United States on the ground that he is not in possession of an unexpired consular immigration visa required under the immigration act of May, 1924.
Secretary SHANAHAN. I second the motion.
Chairman ZINNS. Unanimous.
CHAIRMAN (to alien). This board has voted to refuse you admission to the United States on the ground that you are not in possession of an unexpired consular immigration visa required under the immigration act of May, 1924.
From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom if you should appeal this entire record will be sent for his review.
Q. Do you wish to appeal?
A. Yes.
Q. Do you wish the reply to your appeal by letter or telegram?
A. Letter.
Q. At what address in Canada do you wish to be notified as to the result of your appeal?
A. 141 Acheson Avenue, Niagara Falls, Ontario.

Alien is carefully warned that unless the decision of the
15 board is reversed, it will be unlawful for him to enter the United States unless in possession of an immigration visa.

Alien is further advised that illegal entry will render him liable to arrest and deportation.
Writ of habeas corpus served on chairman and aliens held pending further instructions.

C. P. H. DREHER,
Inspector in Charge.

Chairman ZINNS.
REJ: NO CIV

Appealed.
Certified to be a correct transcript.

D. SHANAHAN,
Secretary.

December 2, 1927.
BUFFALO, N. Y.

DS 1/15

CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR FELDER.

DANELON, ANTONIO.

PEACE BRIDGE. 12/2/27.
NO C.I.V.

11:30 AM to 11:45 AM

Appealed.

Reopening:

Mr. H. Ely Goldsmith, of 105 West 40th St., New York City, appears before the board of special inquiry at the Peace Bridge accompanied by the alien Antonio Danelon. This alien had been debarred here on the first instant on the ground that he was not in possession of an unexpired consular immigration visa required under the immigration act of 1924. He entered an appeal and the
16 Chairman was served with a writ of habeas corpus to produce the alien in court this morning. The alien appeared in the United States District Court for the Western District of New York before the Honorable Judge John R. Hazel, represented by Mr. Goldsmith. Mr. Goldsmith in court moved to set aside the hearing of the board of special inquiry as unfair because the alien was not permitted counsel during the hearing, and the court granted the motion and remanded the alien into the custody of the board of special inquiry with instructions to reopen the hearing and allow Mr. Goldsmith to appear as counsel.

Alien duly sworn.

Mr. GOLDSMITH to board of special inquiry. I object to the form of the third question on page 4 of the record calling for a conclusion as to what an unexpired consular immigration visa entitles an alien to do. The question should have read merely "then at the present time you are not in possession of an unexpired consular immigration visa."

I object to the last question by the chairman on page 4, reading "In case your parents get a visa, what will you do?" as incompetent, irrelevant, and immaterial, calling for a conclusion in case of a contingency which may never happen.

Mr. GOLDSMITH to alien, Antonio Danelon:

Q. You were asked by the chairman what you would do if your parents would get an immigration visa. I ask you now, have
17 you at the present time any intention whatsoever of permanently immigrating into the United States either at this time or at a later time?

A. No.

CHAIRMAN to alien:

Q. When you were asked the question, "In case your parents get a visa, what will you do," you said, "If I am forced to I will go with my father. If my folks move over I will have to go. I couldn't stay over there alone." What do you mean by that?

A. I mean if I am forced to go I will.

Q. You mean then if your father came over you would come also?

A. If I am forced to.

Q. What do you mean by that?
A. I wouldn't go unless I was forced to.
Questions? None.
Inspector FELDEN. I move to reaffirm the motion as made by Inspector Stables that this alien be debarred from the United States on the ground that he has no unexpired consular immigration visa required under the immigration act of 1924.
Secretary SHANAHAN. I second the motion.
Chairman ZINNS. Unanimous.
CHAIRMAN (to alien). This board has voted to refuse you admission to the United States on the ground that you have no unexpired consular immigration visa required under the immigration act of May, 1924.
From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom, if you should appeal, this entire file will be sent for his review. Do you wish to appeal?
18 A. Yes. I wish the reply sent to my address, 141 Acheson Avenue, Niagara Falls, Ontario, by letter.
Alien is advised that illegal entry will render him liable to arrest and deportation.
By the order of the court the alien was paroled into the custody of Mr. Goldsmith.
Rej: NO CIV.
CHAIRMAN ZINNS.

C. P. H. DREHER,
Inspector in Charge.

Appealed

Certified to be a correct transcript.

D. SHANAHAN,
Secretary.

19 In United States District Court

[Title omitted.]

Return to writ of habeas corpus as to relator Mary Cook

Arthur J. Karnuth, acting district director of immigration at Buffalo, New York, within the western district of New York, respectfully alleges and returns.
That the petitioner, Mary Cook, is not in his custody and is not detained by him; that the said Mary Cook was given a hearing on December 1, 1927, at a meeting of a board of special inquiry held at Buffalo, New York. A copy of the minutes taken upon said hearing being hereto annexed and made a part of this return.
That upon the testimony taken the board of special inquiry refused the alien, Mary Cook admittance to the United States on the ground that she was not in possession of an unexpired consular immigration visa required under the immigration act of May 1924; that the immigration inspectors, Zinns, Shana-
20

han, and Stables, who conducted the hearing were duly authorized to examine the petitioner as to her right to remain within the United States and that the petitioner was given a fair hearing and granted her full legal rights in the premises.

The petitioner was advised by said board of special inquiry of her right to appeal to the Secretary of Labor and that said petitioner, Mary Cook, decided to avail herself of that right.

Wherefore respondent prays that the writ of habeas corpus herein be dismissed.

Dated, Buffalo, N. Y., December 5, 1927.

ARTHUR J. KARNUTH,
Acting District Director of Immigration.

[*Duly sworn to by Arthur J. Jarnuth; jurat omitted in printing.*]

21 In United States District Court

Testimony attached to return on Relator Cook.

Ds 1/6

December 1, 1927.
BUFFALO, N. Y.
CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR STABLES.

COOK, MARY.

PEACE BRIDGE, 12/1/27.

Zinns. No. C. I. V.
11:30 AM. to 11:45 AM.
Appealed.
Alien duly sworn:
Age 20; f; s; spinner; Scotland; Scotch; reads and writes English; $1.25; Canada; Niagara Falls, Ontario; father, Robert, 991 Huron Street, Niagara Falls, Ontario; accompanies by H. Ely Goldsmith, attorney; never in the United States; self.
Destination: Buffalo, N. Y.
Med. Certs: None.
Landed: Quebec, May 3, 1924, ex ss "Athenia."
Obj Migr: Cross daily to employment.
Ht. 5'0"; med; bro; gr-blue; born in Blackgrove, Scotland; 1/17/1907.

CHAIRMAN to alien:

Q. What is the purpose of your appearance here?

A. My attorney, Mr. Goldsmith, is here and would like to represent me.

Q. According to Subdivision B of rule 11, it will be impossible for Mr. Goldsmith to appear before this board of special inquiry and represent you as your attorney.

22 H. Ely Goldsmith appears before B. S. I.:

I would like to make a statement regarding my appearance in this case. I desire to state to the board that the United States

District Court of Alabama, in the case of Miora v. Brownlow, reported in 21 Federal Reporter, second series, has held that the provision of the 1917 immigration act holding that special inquiry hearings shall be separate and apart from the public does mean only that they shall be held separate and apart from the curious public and not separate and apart from counsel for the alien. That in the case an alien through his counsel personally makes a request for his counsel to be present in behalf of the alien, and the board refuses counsel to be present during the entire hearing, that then in that event the hearing is not fair and will be set aside by the courts.

CHAIRMAN to Attorney Goldsmith:

Q. You at this time make a request that you be allowed to represent this woman before a board of special inquiry?

A. Yes.

Q. Under the provisions of subdivision B of rule 11, it will be impossible for you to represent this alien before a board of special inquiry.

A. All right; I'll withdraw.

Attorney excused. CHAIRMAN to alien:

Q. Were you ever examined and refused admission to the U. S.?

A. No. I was over here three weeks and he came and told me to go back to Canada.

23. Q. In other words, you came over here and while you were here you found employment, the immigration found it out and told you to return to Canada?

A. Yes.

Q. You were crossing back and forth daily?

A. Yes. I had been crossing daily for three weeks. He said I couldn't come back till I got papers.

Q. Have you ever had any difficulty with the authorities anywhere?

A. No.

Q. Have you been promised work in the United States?

A. No.

Q. Your purpose in coming here now is to seek employment?

A. Just to look for a job.

Q. Where do you reside?

A. Niagara Falls, Ontario, with my parents.

Q. What is your father's name?

A. Robert Cook, 991 Huron St.

Q. How much money have you in your possession now?

A. $1.25, just enough to look for a job and go back. My mother gave me enough for my fare.

Q. At any time while you were crossing the bridge at Niagara Falls were you told it would be necessary to obtain a visa from the American consul to work here?

A. No.

Q. Weren't you told about that when you were returned to Canada?

A. No; they said nothing about a visa.
Q. Have you ever made application anywhere for a visa?
A. No.
Q. Have you any money in the bank?
A. No.
Q. Do you own any property anywhere?
A. No; I give my parents my wages.
24 Q. You are entirely dependent on your folks for support?
A. Just now; you see when I work I give them my wages.
Q. How long have you lived at Niagara Falls, Ontario?
A. We came right to Niagara Falls from the old country.
Q. Where have you been working since coming to Canada?
A. Burgess Battery, Niagara Falls, Ontario; then I was in domestic service on the other side.
Q. Can you read and write?
A. Yes.
(Alien is tested and reads English very fluently.)
Q. Do you intend to commute from Niagara Falls, Ontario, to Buffalo every day if you get a job?
A. Yes. At the Falls I was only getting $3.00 a week.

Inspector STABLES:

Q. Is $1.25 all the money?
A. Yes. I have $40 if I can collect it. I lent it to these people thru my girl friend.
Q. You intend to come from Niagara Falls to Buffalo each day?
A. Yes.

Chairman ZINNS:

Q. What is your reason for appearing at Buffalo, N. Y., for permission to make application when you live in Niagara Falls, Ontario, and the bridges are handier there?
A. There is a silk mill in Buffalo.
25 Q. If you had been admitted to the United States where would you make your home?
A. I intend to go back and forth from Niagara Falls; I have a Ford car.
Q. Are you the owner of the car?
A. It is in my name. It belongs to the family. My brother drives it.
Q. Is the car paid for?
A. Yes.
Q. What does your father do?
A. He works for the city. He gets 45c an hour.
Q. How many are there in the family?
A. Four.
Q. How old are they?
A. The oldest is 22, the youngest 13.
Q. How many are dependent upon your father for support?
A. The two younger ones only.

Chairman ZINNS:

Q. Does your father own any property?
A. We are buying that house.
Q. Do you know how much he has paid on it?
A. No.
Q. Do you know if he has any money in the bank?
A. No.
Q. Have you ever had an identification card to cross for employment?
A. No.

Questions? None.

Inspector STABLES. I move to refuse this alien admission to the United States on the ground that she has no unexpired consular immigration visa required by the immigration act of 1924.

Secretary SHANAHAN. I second the motion.

26 Chairman ZINNS. Unanimous.

Chairman (to alien). This board has voted to refuse you admission to the United States on the ground that you are not in possession of an unexpired consular immigration visa required under the immigration act of 1924.

From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom, if you should appeal, this entire file will be sent for his review.

Q. Do you wish to appeal?
A. Yes.
Q. Do you wish the reply to your appeal by letter or telegram?
A. Letter.
Q. At what address in Canada do you wish to be notified as to the result of your appeal?
A. 991 Huron St., Niagara Falls, Ontario.

Alien is advised that unless the decision of the board is reversed, it will be unlawful for her to enter the United States until in possession of an unexpired consular immigration visa.

Alien is further warned that illegal entry will render her liable to arrest and deportation.

Writ of habeas corpus is served on chairman, and alien is held pending further instructions.

C. P. H. DREHER,
Inspector in Charge.

Chairman ZINNS.
Rej No Civ. Appealed.

Certified to be a correct transcript.

D. SKANAHAN, *Secretary.*

27 DS 1/15

December 2, 1927.
BUFFALO, N. Y.

COOK, MARY.

CHAIRMAN ZINNS.
SECRETARY SHANAHAN.
INSPECTOR FELDEN.

PEACE BRIDGE, 12/2/27.
NO C. I. V.

11:15AM to 11:24AM

Appealed.

Reopening—

Mr. H. Ely Goldsmith, of 105 West 40th Street, New York City, appears before the board of special inquiry at the Peace Bridge, accompanied by the alien, Mary Cook. This alien had been debarred here on the first instant on the ground that she was not in possession of an unexpired consular immigration visa required under the immigration act of 1924. She entered an appeal and the chairman was served with a writ of habeas corpus to produce the alien in court this morning. The alien appeared in the United States District Court for the Western District of New York before the Honorable Judge John R. Hazel, represented by Mr. Goldsmith. Mr. Goldsmith in court moved to set aside the hearing of the board of special inquiry as unfair because the alien was not permitted counsel during the hearing, and the court granted the motion and remanded
28 the alien into the custody of the board of special inquiry with instructions to reopen the hearing and allow Mr. Goldsmith to appear as counsel.

CHAIRMAN to counsel, Mr. Goldsmith:

Q. Are you ready to proceed at this time?

A. I am ready to proceed.

Mr. GOLDSMITH. I have no further questions in regard to the alien, Mary Cook, but desire to be notified by telegram of the decision of the Secretary of Labor, c/o Hotsford, Mitchell, Albro and Weber, attorneys for the alien in a habeas corpus proceeding, whose address is 925 Manufacturers Building, Buffalo, N. Y.

Inspector FELDEN. I move to reaffirm the motion as made by Inspector Stables, that this alien be debarred from the United States on the ground that she is not in possession of an unexpired consular immigration visa required under the immigration act of May, 1924.

Secretary SHANAHAN. I second the motion.

Chairman ZINNS. Unanimous.

CHAIRMAN (to alien). This board has again voted to exclude you from the United States on the ground that you are not in possession of an unexpired consular immigration visa required under the immigration act of 1924.

From this decision you have the right of appeal to the Secretary of Labor at Washington, D. C., to whom, if you should appeal, this entire file will be sent for his review. Do you wish to appeal?

A. Yes. I wish the reply sent to my home address, 991 Huron St., Niagara Falls, Ontario, by letter.

Alien is advised that illegal entry will render her liable to arrest and deportation.

By the order of the court the alien was paroled into the custody of Mr. Goldsmith.

REJ: NO CIV

C. P. H. DREHER,
Inspector in Charge.

Appealed.
Chairman ZINNS.

Certified to be a correct transcript.

D. SHANAHAN, *Secretary.*

[SEAL.]

In United States District Court

[Title omitted.]

Opinion on Writ of Habeas Corpus

Separate applications for writ, argued together, and involving substantially similar questions.

Botsford, Mitchell, Albro & Weber (Preston M. Albro, of counsel), Buffalo, New York; Robert A. Reid, D. C. L. of the Canadian Bar, of counsel on the brief, for relators.

Richard H. Templeton, United States attorney (Richard A. Grimm, assistant U. S. Attorney, of counsel), Buffalo, New York, for respondents.

HAZEL, District Judge. The petition herein for writ of habeas corpus, verified by the attorney for the relators, states, inter alia, that the relators are unlawfully unrestrained of their liberty and are detained under color of the authority of the United States immigration officials; that the relator Cook is a native of Scotland, residing in Niagara Falls, Ont., and had come to Buffalo to seek employment, while the relator Danelon is a native of Italy, who also resides in Niagara Falls, Ont., and is employed as a laborer in industries at Niagara Falls, N. Y. It appears, by the return, that the relators arrived here in the forenoon of December 1st, 1927, from their homes in Niagara Falls, Ont., across from the bridge at Niagara Falls, N. Y.; that both, for some time past, had been crossing back and forth daily, and neither intends to live in the United States, but they intend to continue residing in Canada; and that neither was possessed of an unexpired consular immigration visa, as required by the immigration act of 1924.

The special board of inquiry, consisting of three inspectors, before whom the hearing was had, thereupon unanimously refused admission to the aliens, advising them that they had the right to appeal to the Secretary of Labor, to which each replied that he wished to appeal. At the beginning of their hearing they requested that their attorney, H. Ely Goldsmith, Esq., be heard in their behalf, but this

request was denied upon the ground that they were not entitled to counsel under rule 11, sub. (2) of the immigration rules of March 1st, 1927.

32 Without requesting an appeal, and before their exclusion, the aliens applied for writ of habeas corpus, substantially claiming that they were not immigrants but were temporary visitors for business. At the hearing on the writ, counsel stated that it was not intended to appeal to the Secretary of Labor, since it was anticipated that the decision of the special board of inquiry would be sustained in view of General Order 86, which is attacked as contrary to the statute on the ground that sec. 3 of the immigration act exempts aliens visiting the United States temporarily for business from the classification of immigrants, and is inapplicable to the relators who came here to work and labor, or in search thereof. Failure to exhaust the remedy provided by law was strongly condemned in U. S. ex rel. Grau v. Uhl, 262 Fed. 532, and especially see U. S. v. Tuck, 194 U. S. 161; but I will pass on the questions presented, inasmuch as the facts are not in dispute and we are dealing solely with questions of law. It was also alleged in the petition that the writ was sought because sec. 17 of the immigration act of 1917, providing for a stay of deportation until an appeal taken was decided, was continually violated by the immigration authorities, and aliens returned to Canada before their appeals were taken, and without opportunity to test the correctness of their decisions. There is nothing before me to support this allegation. Indeed, I feel justified in assuming the contrary, since the immigration officials have always, as my experience has shown, treated aliens considerately and have allowed them

33 complete opportunity to test the validity of hearings in the courts, and have delayed deportations until the questions were finally passed upon. The relators were brought into court on the return day by defendants, director of immigration and inspector in charge, and by consent the proceedings were continued to allow time to file a return, the relators, meanwhile, being at large on their recognizance.

Counsel for the relators and the United States attorney, appearing for respondents, urge that this court should pass upon the right of aliens to be represented by counsel at hearings before the special board of inquiry, though the relators were accorded a second hearing, at which, as I understand it, they were represented by Mr. Goldsmith.

Since many aliens, not of Canadian birth or citizenship, arrive daily from Canada, who labor in this country, especially in the border cities, and who likewise have been refused counsel at hearings, under rule 11, the question of the right to exclude counsel will be considered.

Rule 11 of the immigration rules of March 1, 1927, reads as follows:

"Hearings before the boards shall be separate and apart from the public; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed, provided—

"1. That such friend or relative is not and will not be employed by him as counsel or attorney."

34 This rule, or a similar rule, has several times been before the courts for construction in this circuit. In U. S. v. Williams, 190 Fed. 897, for example, the aliens, on their examination preliminary to admission, were refused counsel, and Judge Lacombe ruled that the statute did not authorize the presence of counsel at exclusion hearings; that where aliens had entered and had resided here, they occupied a different status, but that Congress evidently did not intend that the qualifications of aliens intending to enter the United States should be tested by trials calling for the presence of counsel to represent them. On the contrary, the learned court said: "Congress relegated this question to administrative boards who might act summarily and expeditiously, and, to provide against an abuse of their discretion, accorded to the alien a right of appeal to the Secretary of Labor."

See also U. S. ex rel., Falso v. Williams, 191 Fed. 1001, and U. S. v. Chin Fook Wah, 288 Fed. 953, and U. S. v. Greenawalt, 213 Fed. 901. The relators did not ask to have a friend or relative present, as permitted by the regulation under which the hearing was conducted, and, as the order or regulation expressly forbids the aid of counsel, there has been, in my opinion, no deprivation of any legal or constitutional right. The hearing was purely inquisitorial without its having any relation to a criminal examination or investigation. The entry or admission of aliens into the United

35 States, as said in the Greenawalt case, is a high privilege bestowed and not a legal right, and Congress has unquestionably the power to delegate officials or nonjudicial tribunals to exercise functions of a judicial or administrative character for the purpose of insuring effective compliance with the immigration laws, including the deportation of aliens who have unlawfully entered, or their exclusion at the boundary. It is not within the province of this court to attempt to control or interfere with the determination of such officials or tribunals, save only to protect aliens from the abuse of the discretion of administrative boards by way of habeas corpus.

But it is strongly urged that the enforcement of rule 11 is nothing less than a denial of due process of law, and that it is in conflict with rule 18, which permits the presence of counsel in deportation proceedings. I discover no conflict or inconsistency, since a distinction with relation to proceedings against aliens domiciled in the United States, and aliens stopped at the border for summary examination as to their right to enter, is believed to be a proper exercise of procedure; (U. S. v. Williams, supra); and the power to make such an order or regulation was not beyond the power delegated by Congress to the Bureau of Immigration. It is, however, urged that in Miers v. Brownlow, 21 Fed. (2d) 376, it was decided that rule 11 was unauthorized, and that its enforcement by a special board of inquiry constituted a denial to aliens of due

process of law, and, moreover, that the rule unjustly discriminates between aliens seeking admission and those proceeded against for deportation. It was, no doubt, truly said in that case that
36 there is no express provision in the statute giving power to the Secretary of Labor or the Bureau of Immigration to classify aliens or to make rules applicable to resident aliens and aliens subject to exclusion at the boundary. But rule 18, for example, which confers the right of counsel in deportation cases, has generally been accepted by the courts as being within the power and scope of the department, and may be said to have been established by usage and practice. Beyond this, however, the department, which is charged with the enforcement of the immigration act, has the right, and, indeed, it is its duty to prescribe orders, regulations and rules, not only with relation to the details of procedure, but any fair and reasonable rule or method which will enable effective enforcement of the statute. If the prescribed regulation is not in conflict with the immigration act, it certainly falls within the scope of official duty to establish it, even though it is not specifically indicated as to the details. U. S. v. Grimaud, 220 U. S. 506; U. S. v. Birdsall, 233 U. S. 251. It seems to me plain that a rule or order to expedite inquiries of aliens, or hearings before a special board of inquiry, at the border to summarily ascertain the qualifications of aliens desiring to enter the United States, should not match judicial trials or be conducted with similar procedural rules, and, therefore, the suggestion of deprivation of due process of law is not believed applicable; although due process of law, if a fair hearing is not accorded, may be tested on writ of habeas corpus.

The next point earnestly presented is that general order 86—a new order issued April 1st, 1927, by the Commissioner Gen-
37 eral, approved by the Assistant Secretary of Labor—is invalid and in contravention of the immigration act. The order relates to land border crossing procedure, and reads as follows:

"1. Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to seek employment in this country will not be considered as visiting the United States temporarily as tourists, or temporarily for business or pleasure, under any provisions of the immigration law, which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the 'immigrant' class.

"2. However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border-crossing privilege may continue to so enjoy it upon the payment of head tax, provided such head tax was assessible on aliens entering permanently at the time of original admission, and, provided further, that they are not coming to seek employment."

It is with the first provision that we are herein chiefly concerned, since the second provision relates to aliens living in foreign contiguous countries whose border privilege to pass to and fro was continued

on payment of a head tax, and provided they are not coming to seek employment. The relators here are aliens domiciled in a foreign contiguous country and who are daily at work in this country
38 or who seek employment therein; and, as to such aliens, they are not considered by the order as visiting this country temporarily for business under an exemption enumerated in the immigration law, and they are regarded as aliens of the immigrant class pure and simple as distinguished from nonimmigrants.

I think the order, to which the relators have objected, has the warrant of law, for by Title 8, chap. 6, sec. 102, U. S. C. A., power is expressly conferred upon the Commissioner General of Immigration, under the direction of the Secretary of Labor, to establish rules and regulations not inconsistent with the law, to effectively carry out the immigration act and its object and purposes. I discover no inconsistency in the order, and the aliens, by its issuance, in my opinion, are not deprived of any rights accorded them by the immigration act. That they are "immigrants" is plainly apparent from the definition which Congress gives the term. Title 8, chap. 6, sec. 203, U. S. C. A., and the exception (sub. 2) does not mean that a daily workman or employee of the alien class, retaining his residence in foreign contiguous territory, is permitted to pursue an ordinary vocation for a wage, or that he comes here temporarily for business, trade, or commerce. To come for business, within the meaning of the statute, indicates a temporary purpose to engage in a business transaction, as that of a merchant, or one engaging in traffic or trade. Congress did not use the word "business" in its broadest sense, or in a sense including daily labor or an occupation, trade, or calling for hire. It had in mind a restriction of the broad term "business," as is
39 clearly manifest from the general scope and purpose of the act. The relators, under the order, were classified, or fall within the classification or grouping of quota immigrants, and before the examining tribunal or board they were required to prove that they were not subject to exclusion. Their hearing was fairly conducted and they were not subject to admission without first having procured an unexpired immigration visa. (Sec. 13, immigration act.)

The support of the contended invalidity of the order, however, also proceeds on the theory that, as to relator Cook, a subject of Great Britain, article 3 of the Jay treaty of 1794 between Great Britain and the United States applies and establishes her right to "freely pass and repass by land or by navigation into the respective territories and countries, * * * and freely carry on trade and commerce with each other." It is deemed unnecessary to define the scope of article 3 of the Jay treaty, or to hold that it is repealed or modified by legislative enactment, although in ex parte Gin Kato, 270 Fed. 343, where it was contended that early treaty stipulations with Japan were in conflict with the immigration act of 1917, it was held in unqualified terms that Congress has the right to exclude or deport

aliens in its discretion as an inherent right of sovereignty, and that it is the duty of the court to follow the last expression of the law-making authority. See also Cherokee Tobacco case, 11 Wall. 616; U. S. Gue Lim, 176 U. S. 459; Fong Yue Ting v. U. S. 149 U. S. 720. Though the Jay treaty, it is strongly urged, protects Miss
40 Cook from exclusion, I nevertheless, assuming art. 3 to be still in force, think that it can not be considered as including British subjects not born in Canada, whose status is that of immigrants and who seek to cross the border solely to labor here or to seek employment at trades or avocations without establishing a domiciliary status, as provided by the immigration act of 1924. The relators were not passing from one country to another to carry on trade or commerce, as those terms are ordinarily understood, but, as pointed out, simply to work for a daily wage, crossing back to their homes in Canada in the evening and returning in the morning, and such free passing and repassing was not contemplated by the Jay treaty or by Congress in the enactment of the immigration act.

I conclude that order No. 86 is a valid regulation and requires that the relators, before entering, must have an immigration visa, and that they come from contiguous territory to seek employment or to work for a wage, does not change their classification as immigrants.

Other questions argued at the bar have been considered, but may be passed as unsubstantial and without further discussion.

The writ of habeas corpus, heretofore issued, is dismissed and both relators remanded to the custody of the immigration officials for exclusion to the country of which they are residents.

Dated, December 23rd, 1927.

JOHN R. HAZEL, *U. S. D. J.*

41 In United States District Court

UNITED STATES OF AMERICA ON THE PETITION OF PRESTON M. ALBRO, on the relation of Mary Cook and Antonio Dancelon, Relators

against

ARTHUR J. KARNUTH, ACTING DISTRICT DIRECTOR OF IMMIGRATION, et al., respondents

Order dismissing writ

This matter having come on to be heard on the 2nd day of December, 1927, and adjourned dates, and having been duly argued by Preston M. Albro, of counsel for relators, and by Richard A. Grimm, United States attorney, for respondents, and the court having filed its decision and opinion in the premises on the 23rd day of December, 1927, now upon motion of Richard A. Grimm, Esq., of counsel for respondents, it is

Ordered that the writ of habeas corpus herein be and the same is hereby discharged and the relators remanded to the custody of the respondent. Pending appeal the relators may be paroled in custody of Preston M. Albro, of counsel.

Let this order be entered nunc pro tunc as at December 23, 1927.

Dated at New York, N. Y., this 4th day of January, 1928.

JOHN R. HAZEL, *U. S. D. J.*

42 In United States District Court

[Title omitted.]

Petition for appeal

The petitioner, Preston M. Albro, feeling aggrieved by the order and judgment made on the 23rd day of December, 1927, by this court, denying the writ of habeas corpus herein, does hereby appeal from the said order and decision of this court to the United States Circuit Court of Appeals for the Second Circuit, and prays that this appeal may be allowed and that a transcript of the record of proceedings and papers upon which the said order and decision was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, December 24, 1927.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Relators.

Office and P. O. Address, 925 Manufacturers & Traders Building, Buffalo, New York.

To:
United States Attorney for the Western District of New York, attorney for respondents.
Clerk, U. S. District Court, Western District of New York.

43 In United States District Court

[Title omitted.]

Assignment of error

Now comes the petitioner in the above-entitled cause and files the following assignment of errors upon which he will rely upon the prosecution of the appeal in the above entitled cause from a decree made and entered herein by this court on the 23rd day of December, 1927.

The court erred in dismissing the writ of habeas corpus and remanding the aliens to the custody of the inspector in charge at the Immigration Service, Buffalo, New York, for the following reasons:

1. Because the aliens intending to enter the United States in the morning for work to return in the evening to their homes in Canada, were not immigrants but were non-immigrants.

2. Because the aliens being British subjects domiciled in Canada were entitled to cross and recross the border under the provisions of the Jay treaty of 1794.

3. Because the aliens are expressly exempted from the definition "immigrants" in the immigration act of 1924 by the provisions of subdivision 2 of section 3.

4. Because the immigration officials excluded the aliens contrary to the law and contrary to the evidence produced and that therefore the hearing was arbitrary and unfair.

Whereas, by law, the said writ of habeas corpus should have been granted and the aliens should have been released, the said Preston M. Albro prays that for the errors aforesaid and other errors in the record and proceedings the judgment and decision aforesaid made on the 23rd day of December, 1927, may be reversed and for naught held and esteemed, and that the writ of habeas corpus herein be granted and the aliens released, and for such other and further relief as may be proper in the premises.

Dated, New York, December 24, 1927.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Appellants,
926 Manufacturers & Traders Building, Buffalo, New York.

45 In United States District Court

[Title omitted.]

Order allowing appeal

On reading the petition of Preston M. Albro, made in behalf of the aliens detained, dated December 24, 1927, for appeal and consideration of the assignment of errors presented therewith, it is

Ordered that the appeal herein be allowed as prayed for; and it is

Further ordered that a certified copy of the transcript of the record and all proceedings be transmitted to the Circuit Court of Appeals for the Second Circuit.

Dated, New York.

MANTON, *U. S. C. J.*

46-47 In United States District Court

Citation

[Citation in usual form, omitted in printing.]

48 In United States District Court

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a correct transcript of the record said district court in the above-entitled matter as agreed on by the parties.

Dated at Buffalo, N. Y., this 10th day of January, 1928.

BOTSFORD, MITCHELL, ALBRO & WEBER,
Attorneys for Relators.

RICHARD H. TEMPLETON, *U. S. Attorney,*
By RICHARD A. GRIMM, *Asst. U. S. Attorney,*
Attorneys for Respondents.

[Clerk's certificate to foregoing transcript omitted in printing.]

49 In United States Circuit Court of Appeals for the Second Circuit

No. 274—October Term, 1927

Argued February 17, 1928. Decided March 5, 1928.

UNITED STATES, ON PETITION OF PRESTON M. ALBRO, ON RELATION OF Mary Cook and Antonio Danelon, relators-appellant

v.

ARTHUR J. KARNUTH, UNITED STATES DIRECTOR OF IMMIGRATION, AND Charles Dreher, inspector in charge United States Immigration Service, respondent-appellees

Appeal from the District Court of the United States for the Western District of New York.

Before MANTON, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

Opinion

Writ of error to the District Court for the Western District of New York. Relators sued out a writ of habeas corpus, reviewing an order of the board of special inquiry excluding them from the United States. Writ dismissed; relators appeal. Reversed.

Botsford, Mitchell, Albro & Weber, of Buffalo, N. Y. (Preston M. Albro, of Buffalo, N. Y., of counsel), for appellants.

Robert A. Reid, of Toronto, Canada, D. C. L. Barrister, amicus curiæ.

Richard H. Templeton, U. S. Atty., of Buffalo, N. Y. (Richard A. Grimm, Asst. U. S. Atty., of Buffalo, N. Y., of counsel), for appellees.

H. Ely Goldsmith, of New York City, consultant in immigration matters, amicus curiæ.

MANTON, Circuit Judge: Mary Cook, a British subject, and Antonio Danelon, a naturalized citizen of Canada and a British subject, sued out a writ of habeas corpus to review proceedings of the board of special inquiry of the Immigration Service, which held that they should be refused admission to the United States because they had no unexpired consular immigration visas, as required by the immigration act of 1924 (8 U. S. C. A. §§ 166, 167, 179, 201–226), and pursuant to rule 86 promulgated by the Department of Labor.

Danelon worked at Niagara Falls, but lived in the Dominion of Canada. Mary Cook, residing in the Dominion of Canada and intending to remain there, crossed the border, seeking employment in the United States. They were arrested on December 1, 1927. The court below dismissed the writ of habeas corpus, sued out by them, because (a) they were persons entering the United States, one looking for employment and the other solely to work, and each to return in the evening to an adjoining foreign country, and were not temporary visitors but were immigrants; (b) they were not protected as British subjects by the Jay treaty of 1794 (8 Stat. 116); and (c) in any event the Jay treaty does not apply to British nationals of other than Canadian birth and classified by Order 86 as immigrants.

Immigration act 1924 (§ 203, title 8, c. 6, U. S. C. A.) provides that—

"When used in this subchapter the term 'immigrant' means any alien departing from any place outside of the United States destined for the United States, except * * * an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

Section 102 of U. S. C. A., c. 6, tit. 8, provides that the commissioner having charge of the administration of the laws regulating the immigration of aliens into the United States shall make rules and regulations and prescribe such forms of bond, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with the law, as he shall deem best calculated for carrying out the provisions of this section and sections. Pursuant to that authority the commission issued General Order No. 86 on April 1, 1927, effective July 1, 1927, reading:

"(1) Hereafter aliens residing in foreign contiguous countries and entering the United States to engage in existing employment or to secure employment in this country will not be considered as visiting the United States temporarily as tourists or temporarily for business or pleasure under any provision of the immigration law which exempt visitors from complying with certain requirements thereof; that is, they will be considered as aliens of the 'immigrant' class.

"(2) However, the following aliens of the said 'immigrant' class residing in foreign contiguous countries and who are now enjoying the border-crossing privilege may continue so to enjoy upon the payment of head tax, provided such head tax was assessable on aliens entering permanently at the time of original admission, and provided further, that they are not coming to seek employment."

The commissioner may not make regulations to enforce the immigration act which are beyond the powers delegated by Congress to him by section 102. The Parthian (C. C. A.), 276 F. 903. If the commissioner had lawful authority to issue order No. 86, it would prevent the relators crossing daily and classify them as immigrants. A question is presented as to whether these relators, domiciled in Canada, crossing, one for employment and the other seeking employment, are immigrants within the meaning of the immigration act. Were they temporarily in the United States for business, and what privileges are accorded to them by reason of the Jay treaty of 1794?

In Moffit v. United States (C. C. A.) 128 F. 375, in considering the immigration act of March 3, 1891 (26 Stat. 1084), the court had under consideration the importation of aliens under contracts or agreements to perform labor, and, holding that it clearly related to immigration, said that immigrants meant persons removing into the country for the purpose of permanent residence. The court held that, in considering the penalty imposed by section 10 of the act (26 Stat. 1086) on the master of a vessel for neglecting to detain on his vessel any alien who may unlawfully come to the United States on such vessel, or to return him to the port from which he came, must be construed in the light of such purposes and limited in its application to cases of alien immigrants. The court said, referring to the Standard Dictionary, that the meaning of the word "immigrant," as there defined, applied to the word used in the statute in order to describe the intent of Congress, and approved the definition that "immigrant" meant a person who removes into a country for the purpose of permanent residence or a person passing or removing into a country for the purpose of permanent residence. See, also, Ex parte Hoffman (C. C. A.) 179 F. 839; Taylor v. United States (C. C. A.) 182 F. 1.

Section 203, title 8, chapter 6, defines the term "immigrant" as meaning any alien departing from any place outside of the United States destined for the United States. In view of the common acceptation, or the definition, by standard dictionaries, of the term "immigrant," an alien destined for the United States must be deemed to have intended a change of his domicile and removal from the country of his domicile for the purpose of permanent residence. See Webster's Dictionary; Century Dictionary. And Congress excepted aliens visiting the United States temporarily for business or pleasure.

The appellee contends that business does not include ordinary occupation, but refers rather to trading and merchandising. Business has been defined as a very comprehensive term, and embodies everything by which a person can be employed, and, again, "that which occupies the time, attention, and labor of men for the purpose of livelihood or profit; but it is not necessary that it should be the sole occupation or employment. It embraces everything by which a man can be employed." Flint v. Stone-Tracy Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; 9 Corpus Juris, 1101; Goddard v. Chaffee, 2 Allen (84 Mass.) 395, 79 Am. Dec. 796.

In United States v. Michigan Central R. R. Co. (C. C.)
51 48 F. 365, the railroad company employed in its office in New York, near the Canadian border, a resident of Canada, who came daily to his work in the United States. It was sued, under the contract labor law, for assisting and encouraging importation or migration of an alien, within the meaning of that law. Wallace, J., directing a judgment for the defendant, said:

"The several provisions of the act are directed against assisted immigrants, as well as those who prepay their transportation or encourage their migration or importation by previous contract. Blount was not an immigrant, because he did not come here intending to acquire a permanent or a temporary home. As he did not migrate here, the defendant did not encourage his 'migration.' He was not imported, nor did the defendant assist in his 'importation,' any more than he was exported, and assisted in his exportation, when he went home at night. It may be that such a case as this is within the mischief which the promoters of the law intended to remedy, but it is not within the ordinary import of the words of the statute. If every person who comes into this country migrates, or is imported, within the meaning of the statute, because he remains temporarily, and works here, the statute will reach many cases in which its application would be a manifest absurdity."

The Jay treaty of 1794 between the United States and Great Britain provides the right of free temporary passage across the Canadian border in article 3 (Treaty of Amity, Commerce, and Navigation, 1794.) Article 3 provides:

"It is agreed that it shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other."

By article 28 of that treaty it was provided that the first 10 articles of the treaty were to be permanent. In considering the intention of Congress, the terms of this treaty are pertinent. An act of Congress may supersede a prior treaty (The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227), and an irreconcilable conflict between the act of Congress and any treaty results in the last in date prevailing (Hijo v. United States, 194 U. S. 315, 24 S. Ct. 727, 48 L. Ed. 994). But the courts will be slow to assume that Congress intended to violate a treaty right. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. Ed. 544; Chew Heong v. United States, 112 U. S. 536, 5 S. Ct. 255, 28 L. Ed. 770.

There is no question at bar as to the permanent immigration of aliens, nor have we questions of social welfare to our inhabitants which must be considered in the construction of this act of Congress. Where it is possible, in construing the statute, we should conform to

the provisions of the treaty. United States v. 43 Gallons of Whisky, 108 U. S. 496, 2 S. Ct. 906, 27 L. Ed. 803; Ward v. Race Horse, 163 U. S. 504, 16 S. Ct. 1076, 41 L. Ed. 244. Nowhere in the immigration act do we find this right, accorded by the treaty to Canadian citizens to pass and repass, which is allowed by the Jay treaty, taken from them; certainly not by expressed intent. The treaty and the immigration act do not seem inconsistent, but are reconcilable. This treaty was a mutual border-crossing right, accorded to the parties thereto and for their own special interest. The treaty was not terminated by the War of 1812. Soc. for the Propagation of the Gospel in Foreign Parts v. Town of New Haven, 8 Wheat. 464, 5 L. Ed. 662; Woolsey, International Law (6th Ed.) 1897, p. 263; Moore's Digest of International Law (1906), vol. 5, pp. 372, 383; U. S. ex rel. Diabo v. McCandless (D. C.), 18 F. (2d) 282.

The immigration laws have been deemed to include all conventions and treaties of the United States relating to immigration, exclusion, or expulsion of aliens. Terlinden v. Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. Ed. 534. The treaty provisions of a country must be construed so as to best conform to the accepted principles of international law and not in derogation of them. Vilas v. City of Manila, 220 U. S. 345, 31 S. Ct. 416, 55 L. Ed. 491. They should be liberally construed, so as to carry out the apparent intention of the contracting parties to secure equality and reciprocity between them. De Geofroy v. Riggs, 133 U. S. 258, 271, 10 S. Ct. 295, 33 L. Ed. 642; In re Ross, 140 U. S. 453, 475, 11 S. Ct. 897, 35 L. Ed. 581. Undoubtedly the plain intention of article 3 of the treaty and the explana-
32 tory article thereof was to give intercourse freely among the people of each country on both sides of the line or international boundary. Such commercial and friendly intercourse, together with the freedom of navigation and passage, is not inconsistent with the right of this Nation to debar aliens from admission to this country.

The term "immigrant" has an entirely different meaning, and the immigration statute an entirely different purpose. Nothing in the treaty nor, indeed, in the exception in section 203, which permits visiting the United States temporarily for business, places a limit as to time or frequency of passing. It is obvious that both intended to observe the freedom of mutual international intercourse for their subjects in order to engage in business and commerce and to carry on trade. Moreover, the supplemental agreement of 1796 (8 Stat. 130) was made permanent by the nations. Society, etc., v. New Haven, supra; Kent's Commentaries on International Law (Abdys' Ed.) p. 394.

This treaty was intended for the benefit of all British subjects. Shanks v. Dupont, 3 Pet. 241, 7 L. Ed. 666. It is intended to make effective the purposes of the high contracting parties and should receive a reasonable construction, with a view to giving a fair operation to the whole. Sullivan v. Kidd, 254 U. S. 433, 41 S. Ct. 158, 65 L. Ed. 344; Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984. The treaty has been considered in

force and effect since 1812. Jackson v. Clarke, 3 Wheat. 1, 4 L. Ed. 319 (1818); Hughes v. Edwards, 9 Wheat. 489, 6 L. Ed. 142 (1824); Shanks v. Dupont, 3 Pet. 241, 7 L. Ed. 666 (1830).

Because the relators were not immigrants within section 203, and were within the exception of that section, they were both permitted to enter the United States temporarily for their respective business, one to work and the other seeking employment. At no time did they intend to remain permanently in the United States or seek to migrate here. Moreover, the treaty effective at the time of their crossing and recrossing gave them, as British subjects, privileges accorded under the explanatory note of article 3 of the treaty of 1794, which included that of crossing and recrossing for the purpose of business and commerce, and such they were engaged in. The writs should have been sustained and their discharge granted.

Order reversed.

53 In United States Circuit Court of Appeals, Second Circuit

UNITED STATES EX REL. PRESTON M. ALBRO, RELATOR-APPELLANT

v.

ARTHUR J. KARNUTH ET AL., RESPONDENTS-APPELLEES

Decree

Filed March 12, 1928

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said district court be and it hereby is reversed.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

54 Indorsed: United States Circuit Court of Appeals, Second Circuit. U. S. ex rel Preston M. Albro v. A. J. Karnuth et al. [File indorsement omitted.]

55 [Clerk's certificate to foregoing transcript omitted in printing.

56 Supreme Court of the United States

Order revoking order denying certiorari

On consideration of the petition for rehearing filed herein,
It is now here ordered by this court that the said petition be, and the same is hereby, granted. The order heretofore entered denying the petition for a writ of certiorari in this case is revoked, and a writ of certiorari herein is granted.
November 19, 1928.

57 Supreme Court of the United States

Order allowing certiorari

Filed November 19, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.
[Indorsement on cover:] File No. 33,507. U. S. Circuit Court of Appeals, Second Circuit. Term No. 198. Arthur J. Karnuth, United States director of immigration, and Charles Dreher, inspector in charge United States Immigration Service, petitioners, vs. United States of America, on the petition of Preston M. Albro, an attorney, for Mary Cook and Antonio Danelon. Petition for writ of certiorari and exhibit thereto. Filed June 12th, 1928. File No. 33,507.

○